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The Self-Incrimination Clause--Comment on the Accused's Failure to Testify--Proposed Amendment to the Code of Criminal Procedure

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considered as only partially breached. And when there is only a partial breach of the covenant, it would seem that the entire consideration money may not be recovered but the vendee may only recover *pro tanto*.⁴⁸ Thus where grantors covenanted that they were seised of an absolute estate of inheritance in fee simple in the premises, while they only possessed a life estate, the covenant was held to be partially breached and the grantee could only recover a proportional part of the consideration, the value of such life estate being deducted as his title to that extent was good.⁴⁹ In such actions to recover for the partial breach of the covenant, the usual measure of damages allowed is such part of the original price as bears the same ratio to the whole consideration that the value of the land to which title has failed bears to the value of the whole premises.⁵⁰ The same general principles concerning interest, costs, improvements, *etc.*, mentioned above and which govern the final recovery when there is a total breach, apply likewise in these actions.

EDWARD T. REILLY.

THE SELF-INCRIMINATION CLAUSE—COMMENT ON THE ACCUSED'S
FAILURE TO TESTIFY—PROPOSED AMENDMENT TO THE
CODE OF CRIMINAL PROCEDURE.

At a meeting held September 12, 1935, the Judicial Council of the State of New York publicly announced through its chairman, Chief Justice Crane, the drafting of a bill to be submitted to the next session of the state legislature, amending the New York Code of Criminal Procedure so as to permit comment by the prosecuting attorney on the failure of the defendant in a criminal trial to testify in his own behalf.¹ A similar bill, sponsored by the Attorney-General, was introduced to the recent session of the New York legislature

⁴⁸ *Morris v. Phelps*, 5 Johns. 49 (N. Y. 1809).

⁴⁹ *Tanner v. Livingston*, 12 Wend. 83 (N. Y. 1834).

⁵⁰ *Morris v. Phelps*, 5 Johns. 49 (N. Y. 1809); *Guthrie v. Pugsley*, 12 Johns. 126 (N. Y. 1815); *Kane v. Sanger*, 14 Johns. 89 (N. Y. 1816); *Wager v. Schuyler*, 1 Wend. 553 (N. Y. 1828); *Tanner v. Livingston*, 12 Wend. 83 (N. Y. 1834); *Giles v. Dugro*, 1 Duer 331 (N. Y. 1852); *Furniss v. Ferguson*, 15 N. Y. 443 (1857); *Hunt v. Raplee*, 44 Hun 149 (N. Y. 1887); *Grantier v. Austin*, 66 Hun 157 (N. Y. 1892); *Brown v. Allen*, 73 Hun 291 (N. Y. 1893); *Sweet v. Howell*, 96 App. Div. 45, 89 N. Y. Supp. 21 (3d Dept. 1904); *Roak v. Sullivan*, 96 Misc. 429, 125 N. Y. Supp. 835 (1910); *Hilliker v. Rueger*, 228 N. Y. 11, 126 N. E. 266 (1920).

¹ N. Y. L. J., Sept. 17, 1935. See also REPORT OF THE SPECIAL COMMITTEE ON THE REVISION OF THE N. Y. CODE OF CRIMINAL PROCEDURE, tentative draft of chapter on Preliminary Examination, tit. III, c. 3, §198, in N. Y. L. J., Sept. 23, 1935.

and rejected by both houses.² Like resolutions were voted by the American Bar Association and the American Law Institute in 1931.³ Several of the states have considered proposals to change the existing rule of law to allow the jury to draw inferences from the defendant's refusal to offer testimony refuting the charges brought against him or to permit the court or prosecution to comment on that fact.⁴ Nevertheless the law in forty-two of the states still protects the accused from being compelled to testify against himself, and prevents comments upon, or inferences from, his refusal to take the witness stand in his own trial.⁵

The efforts made to change the rules of judicial procedure to meet the requirements of modern conditions, by making the defendant's silence in a criminal action the proper subject of comment by the prosecuting attorney, have raised serious constitutional questions as well as doubts as to the propriety of changing a principle of law that has existed in New York since 1869 and earlier in some of the other states.

The maxim *Nemo tenetur prodere seipsum* (No one is bound to accuse himself) is of doubtful origin.⁶ However, it was apparently first introduced to the common law by Lord Coke at the beginning of the seventeenth century in his campaign to curtail the power of the Court of High Commission.⁷ From the earliest days, in both the ecclesiastical and secular courts, evidence secured by admissions extracted from the accused under extreme coercion and torture, was competent to secure his conviction. Charges requisite to allow tor-

² Senate Bill No. 652, Int. 611, died in Committee. Assembly Bill No. 1467, Int. 920, died in Committee. (Both bills provided for comment by court and district attorney.)

³ "That by law it should be permitted to the prosecution to comment to the jury on the fact that a defendant did not take the stand as a witness; and to the jury to draw reasonable inferences." 56 REPORTS OF AM. BAR ASS'N 137, 152; "The judge, the prosecuting attorney and counsel for the defense may comment upon the fact that the defendant did not testify." 9 PROC. AM. LAW INST. 218.

⁴ See Reeder, *Comment on the Accused's Failure to Testify* (1931) 31 MICH. L. REV. 40.

⁵ The six non-conformist states are: Georgia, where the accused is still not a competent witness; Iowa, where the statute preventing comment was repealed; New Jersey, where the constitution contains no self-incrimination clause and judicial decisions have allowed comment, *State v. Zdanawicz*, 69 N. J. L. 619, 55 Atl. 743 (1903); *Parker v. State*, 61 N. J. L. 308, 39 Atl. 651 (1898); *State v. Kisik*, 99 N. J. L. 385, 125 Atl. 239 (1924); Nevada, where the court may comment only when the defendant requests instruction as to his right to refrain from testifying; Ohio, whereby constitutional amendment to art. I, §10 (Sept. 3, 1912) comment is permitted; and South Dakota, where, by statute enacted in 1927, defendant's silence is made the proper subject of comment by the prosecuting attorney. S. D. STATS. 1927, c. 93, p. 116.

⁶ Corwin, *The Supreme Court's Construction of the Self-Incrimination Clause* (1930) 29 MICH. L. REV. 3.

⁷ 4 WIGMORE, EVIDENCE (2d ed. 1923) §2250; 2 CHAMBERLAYNE, EVIDENCE, §1543 *et seq.*

ture could be made on the basis of mere rumor substantiated by two witnesses. To protect persons accused of crime from over-zealous prosecutors, the principle that no person may be compelled to testify against himself, was enlarged to render the defendant an incompetent witness and to make his testimony inadmissible against himself.

Incorporated into the common law, this doctrine was applied throughout the American colonies. Following independence the rule of law was adopted in the constitution of every state in the Union, except Iowa and New Jersey, though by language restricted to the prohibition upon self-incrimination.⁸ By the common law the defendant continued to be incompetent as a witness in the state and federal courts until a wave of legislation, following a statute in Maine in 1864, removed the disability of the defendant as a witness in the federal jurisdiction and in every state but Georgia.⁹ The early statutes in Maine, California,¹⁰ and South Carolina¹¹ allowed the accused to testify at his own request but made no mention of the right by court or prosecution to comment on his failure to so request. The Maine courts allowed such comments to be made and inferences to be drawn under the statute¹² causing the legislature, in 1879, to provide that the defendant's silence should not be taken as evidence of his guilt.¹³ In California the Supreme Court decided that the state constitution, by the clause protecting the accused from being compelled to testify, forbade comment by the trial court on his refusal to testify.¹⁴ A later statute expressly provided that failure to testify should not prejudice the accused.¹⁵ The Supreme Court of South Carolina declared that the statute, though it did not in express terms say no presumption should arise from defendant's failure to testify, nevertheless forbade such presumption.¹⁶ Most of the other states followed the statute enacted in Massachusetts in 1866, which allowed the defendant to testify if he so desired but provided that no presumption should arise from his failure to speak.¹⁷ The Federal Government accepted the reform by the Act of Congress in 1878, which declared that the accused in the federal courts "shall at his own request, but not otherwise, be a competent witness. And his

⁸ WIGMORE, *op. cit.* §2252, n. 1.

⁹ THAYER, EVIDENCE (2d ed.) 1117; Me. Laws of 1864, c. 280, p. 214; Ga. Laws of 1866, p. 138.

¹⁰ Stats. of Cal. (1865-6) c. 644, p. 865.

¹¹ Stats. of S. C. (1866) Act. 4780, §2; 13 S. C. STATS. 366.

¹² State v. Bartlett, 55 Me. 200 (1867); State v. Cleaves, 59 Me. 298 (1871).

¹³ See State v. Banks, 78 Me. 490, 7 Atl. 269 (1886); State v. Landry, 85 Me. 95, 26 Atl. 998 (1892).

¹⁴ People v. Tyler, 36 Cal. 522 (1869).

¹⁵ Reeder, *op. cit. supra* note 4; see People v. Sanders, 114 Cal. 216, 46 Pac. 153 (1896).

¹⁶ State v. Howard, 35 S. C. 197, 14 S. E. 481 (1891).

¹⁷ MASS. ACTS AND RESOLVES, c. 260, p. 245 (1866).

failure to make such request shall not create any presumption against him." ¹⁸

The New York law, passed in 1869,¹⁹ while making the accused a competent witness, also protected him from presumptions likely to arise if he availed himself of his constitutional privilege not to testify. The trend away from the rigidity of the common law rule was recognized and criticized by the Court of Appeals in the case of *Ruloff v. People* ²⁰ in 1871, when it said:

"The act may be regarded as of doubtful propriety, and many regard it as unwise, and as subjecting a person on trial to a severe, if not cruel, test. If sworn, his testimony will be treated as of but little value, will be subjected to those tests which detract from the weight of evidence given under peculiar inducements to pervert the truth when the truth would be unfavorable, and he will, under the law as now understood and interpreted, be subjected to the cross-examination of the prosecuting officer, and made to testify to any and all matters relevant to the issue, or his own credibility and character, and under pretence of impeaching him as a witness, all the incidents of his life brought to bear with great force against himself. He will be examined under the embarrassments incident to his position, depriving him of his self-possession and necessarily greatly interfering with his capacity to do himself and the truth justice, if he is really desirous to speak the truth. These embarrassments will more seriously affect the innocent than the guilty and hardened in crime. Discreet counsel will hesitate before advising a client charged with high crimes to be a witness against himself, under all the disadvantages surrounding him. *If, with this statute in force, the fact that he is not sworn can be used against him, and suspicion be made to assume the form and have the force of evidence, and circumstances, however slightly tending to prove his guilt, be made conclusive evidence of the fact, then the individual is morally coerced, although not actually compelled to be a witness against himself. The constitution, which protects a party accused of crime from being a witness against himself, will be practically abrogated.* (Italics supplied.)

¹⁸ 20 STAT. 30, 28 U. S. C. A. §632 (1926); see *Wilson v. United States*, 149 U. S. 60, 13 Sup. Ct. 765 (1892); *Reagan v. United States*, 157 U. S. 301, 15 Sup. Ct. 610 (1894).

¹⁹ N. Y. CODE OF CRIMINAL PROCEDURE §393, "The defendant in all cases may testify as a witness in his own behalf but his neglect or refusal to testify does not create any presumption against him." See *People v. Friedman*, 149 App. Div. 873, 134 N. Y. Supp. 153 (1912); *People v. Sanders*, 264 N. Y. 119, 190 N. E. 204 (1934). That prosecuting attorney may not comment on defendant's failure to testify see *People v. Minkowitz*, 220 N. Y. 399, 115 N. E. 987 (1917); *People v. Michor*, 226 App. Div. 569, 235 N. Y. Supp. 386 (1929).

²⁰ 45 N. Y. 213 (1871).

"The legislature foresaw some of the evils and dangers that might result from the passage of this act, and did what could be done to prevent them by enacting that the neglect or refusal of the accused to testify should not create a presumption against him."

The above-quoted opinion, besides indicating the hesitation of the court in approving the legislation then before it, expresses in some measure the arguments of those opposed to the adoption of the rule advocated by the Judicial Council.

The issues are, in the main, these:

- (1) Will the interests of justice be served by the proposed amendment?
- (2) Will the right to comment by the prosecution on the defendant's refusal to testify, virtually compel the latter to incriminate himself, in violation of his constitutional privilege?
- (3) Will the measure deny the defendant his rights secured under the Due Process clause of the Fourteenth Amendment to the United States Constitution?

The answer, by the sponsors of the new legislation, to the first question is expressed by Attorney-General Bennett:

"The one who knows most about the charges with which he is confronted is the defendant. The fact that he fails to testify in his own behalf logically warrants an inference that he is either unable to explain the facts that seem to inculcate him or that he has some facts bearing on his guilt that he wishes to conceal. Similar inferences from silence or failure to call witnesses are permissible in civil cases."

On the other hand, it is said that the defendant's desire to avail himself of his constitutional privilege to remain mute can be predicated on many other grounds than knowledge of his guilt, and that in any case, as held in a Missouri case: ²¹

"Guilt is not to be presumed from the failure to disprove any fact. The defendant is presumed innocent until the State establishes his guilt. The burden is not on him to prove his innocence but on the State to show it beyond a reasonable doubt."

²¹ *State v. Snyder*, 182 Mo. 462, 82 S. W. 12 (1904).

But whether or not an inference of guilt can be properly drawn from the defendant's silence, it is admitted that a jury, without any instructions on the subject, is apt to draw an inference unfavorable to the defendant where he fails to testify. It is claimed that such an inference is natural in view of the common experience of men and so should be allowed in a trial by jury. In *State v. Ford*, the court said: ²²

"* * * The failure of one charged with the commission of a crime to deny the performance of the acts attributed to him is logically relevant to the issue of his guilt or innocence. At all events, no court or jury can fail to give some weight, more or less according to the circumstances of the case, to such conduct of the accused. It is a fact of the case which is obvious, and no statute or ruling of the Court can prevent the trier as a general rule from drawing inferences from that fact."

Said the court in *State v. Cleaves*: ²³

"The defendant, in criminal cases, is either innocent or guilty. If innocent, he has every inducement to state the facts which would exonerate him. * * * This declining to avail himself of the privilege of testifying is an existent and obvious fact. * * * The jury cannot avoid perceiving it. Why should they not regard it as a fact of more or less weight in determining the guilt or innocence of the accused? * * *"

In *Parker v. State*, the court declared: ²⁴

"Such an inference is natural and irresistible. It will be drawn by honest jurymen and no instructions will prevent it. Must a court refrain from noticing that which is so plain and forcible an indication of guilt?"

Opponents of the measure, while admitting in general the inevitability of the inference, find in that fact no reason for aiding the drawing of the inference by actively bringing the attention of the jury to the defendant's failure to testify. Their view is effectuated in *State v. Colonese*, where the court held: ²⁵

"There is nothing in the statutory provision or in our rules of law which requires the jury to disregard the fact that the

²² 109 Conn. 490, 146 Atl. 828 (1929).

²³ WIGMORE, *op. cit. supra* note 7, §2272, par. 2; 59 Me. 298 (1871).

²⁴ 61 N. J. L. 308, 39 Atl. 651 (1898).

²⁵ 108 Conn. 454, 143 Atl. 561 (1928). But see *supra* note 22.

accused did not testify. Nor does it forbid the jury to draw its own conclusion from this circumstance. The requirements of law are fully met when counsel and the court have avoided comment upon the fact that the accused has failed to take the witness stand in his own behalf."

So great has been the fear of such inferences as might be drawn by a jury, that one court insisted that the jury should be instructed not even to discuss the matter between themselves.²⁶

A more serious question arises with reference to the constitutionality of the proposed legislation in light of the self-incrimination clause of the New York State Constitution.²⁷ If the accused, fearing the effect of comment on his failure to testify, takes the stand to prevent such comment, has he been compelled to give evidence against himself? We have already noted the view taken in *Ruloff v. People*.²⁸ In *State v. Ford*,²⁹ decided one year after the *Colonese* case, the Connecticut court said:

"It has been argued that, independent of statutory provision, an accused is entitled to a ruling that no inference prejudicial to him shall be drawn from his failure to testify, since otherwise it will become practically obligatory upon him to testify, and he will be deprived of his constitutional privilege. The Constitutional privilege goes no further historically or logically than to prevent the employment of legal process to compel an accused to incriminate himself by what he may say upon the witness stand. He cannot be compelled to testify against his will. The privilege of refraining from testifying, if he so elect, does not protect him from any unfavorable inference which may be drawn by his triers from his exercise of that privilege. * * * Not only is the inference a natural one, but permitting it to be drawn is not a violation of the constitutional privilege. There is no actual compulsion upon the accused to testify, and when he elects not to do so, he is obviously not being compelled to give evidence against himself."

It may well be that, in light of the historical setting of the self-incrimination clause of the common law, the constitutional protection should be limited to the very circumstances for which it was designed, and thus would not be violated merely because accused persons would find it more expedient to testify than to remain silent.

²⁶ *Wilson v. State*, 39 Tex. Cr. 365, 46 S. W. 251 (1898).

²⁷ Art. I, §6: "No person shall be subject to be twice put in jeopardy for the same offense; nor shall be compelled in any criminal case to be a witness against himself; nor be deprived of life, liberty or property without due process of law."

²⁸ *Supra* note 20.

²⁹ *Supra* notes 22 and 25.

The Colorado Supreme Court held that if an inference could be drawn against the accused from his silence the constitutional provision, that no person should be compelled to give evidence against himself, would be abrogated.³⁰

"For if silence is to be taken as evidence of guilt, the defendant's option is of but little avail; he is practically forced to testify, and once upon the witness stand may be required to give the very testimony upon which the conviction shall rest."

Criticizing the resolutions of the American Bar Association and the American Law Institute relative to comment on the defendant's refusal to testify, one author declared: ³¹

"The plan is obviously unconstitutional, in the case of federal legislation under the Constitution of the United States and in the case of state legislation under normal state constitutions,³² if the effect of such a provision is to force the accused to take the stand or to suffer a real detriment if he does not do so. And, on the other hand, if the jury is to be aided in drawing a natural inference from the silence of the defendant it is obviously necessary to provide safeguards to insure that only a natural inference will be drawn. For example, * * * a man who is entirely innocent of the crime charged, may fear that discreditable cross-examination would bring out evidence concerning another offense which could not be considered by the jury if he did not take the stand, and which might so injure him in the eyes of the jury as to bring about his conviction."

Whether or not the proposed amendment would violate the Fourteenth Amendment of the United States Constitution, guaranteeing that no person shall be deprived of life, liberty or property without due process of law, is a question not satisfactorily answered by the case of *Twining v. New Jersey*.³³ The United States Supreme Court did decide in that case that the due process clause of the Fourteenth Amendment does not render unconstitutional the instruction of a state court that the jury might make such inferences as it finds reasonable from the defendant's failure to take the witness stand, declaring that protection from compulsory self-incrimination is not an essential element of due process, and that it is not one of the privileges or immunities of national citizenship guaranteed by the Fourteenth Amendment against abridgement by the states.

³⁰ *Petite v. People*, 8 Colo. 518, 9 Pac. 622 (1895).

³¹ Cited *supra* notes 4 and 15.

³² Such as the N. Y. CONST., cited *supra* note 27.

³³ 211 U. S. 78, 29 Sup. Ct. 14 (1908).

But the court added: ³⁴

"We have assumed only for the purpose of discussion that what was done in the case at bar was an infringement of the privilege against self-incrimination. We do not intend, however, to lend any countenance to that assumption. The courts of New Jersey, in adopting the rule of law complained of here, have deemed it consistent with the privilege and not a denial of it." ³⁵

Since New Jersey is without a self-incrimination clause in its constitution, it cannot be said that the *Twining* case is authority for the proposition that in a state with a constitution protecting the accused from being compelled to testify, a statute allowing the prosecution to comment on the accused's failure to testify does not violate the Due Process clause of the Fourteenth Amendment.

It is to be noted that the Supreme Court did not urge that comment on the accused's silence would tend to compel defendants to take the stand in violation of the compulsory self-incrimination protection afforded by the common law in New Jersey,³⁶ but acknowledged the decision of the New Jersey courts that comment was compatible with the defendant's right. But comment in the New Jersey courts is restricted to occasions when there is a "duty" upon the defendant to speak, and he refuses.

"It is well-settled that evidence may be admitted against an accused establishing the fact that declarations as charges of his guilt were made to him, and that he made no reply, provided that the occasion was such that a reply from him might be properly expected. * * * When the accused is upon trial and the evidence tends to establish facts which if true would be conclusive of his guilt of the charge against him and he can disprove them by his own oath as a witness if the facts be not true, then his silence would justify a strong inference that he could not deny the charges." ³⁷

To recapitulate: The self-incrimination clause of the constitution was adopted from the common law, where it was developed under circumstances quite unlike modern conditions. It was designed to stop the forcing of incriminating evidence from the mouth of the accused, and did so by disqualifying him as a witness.³⁸

³⁴ *Id.* at 114.

³⁵ Read dissenting opinion by Justice Harlan, *ibid.*

³⁶ See cases cited *supra* note 5. By statute the defendant is qualified to testify. N. J. Laws of 1898, c. 237, §57.

³⁷ *Parker v. State*, *supra* note 5.

³⁸ See *supra* notes 6, 7 and 8.

Today there is no such pressure upon one accused of crime. A defendant has been made a competent witness in his own behalf.³⁹ He may speak, and when he can refute the charges brought against him by so doing, yet fails to testify, the inference of guilt arises. To permit comment on such failure to forward an explanation is to recognize and validate an existing fact.

If the amendment to the New York Code of Criminal Procedure proposed by the Judicial Council is so worded as to allow the prosecuting attorney to comment on the defendant's failure to testify only when the evidence against the accused is such that, were he innocent, he could refute the charges against him, then it may well be considered constitutional, just and expedient. But it must be borne in mind that until the prosecution has made out a case against the defendant calling for a reply other than that furnished by his witnesses, till then his silence cannot be considered an indication of guilt, and no comment thereupon should be permitted.

G. ROBERT ELLEGAARD.

THE EFFECT OF THE DEPRESSION ON THE DUTIES AND LIABILITIES
OF THE TRUSTEE IN RELATION TO TRUST FUND INVESTMENTS.

The trustee who has acted prudently, with reasonable diligence, and in good faith will not be held liable for trust fund losses caused by the depression. "Executors¹ and trustees cannot be watchers of the tape, nor gamblers in stocks," declared Surrogate Slater in *In re Winburn*.² "There is no need for executors to jettison worthwhile stock during a financial panic." The *Winburn* case further indicates that if "worthwhile" or "seasoned" securities decline because of a general business depression, the trustee has done all that a reasonable man can do, and is not to be held liable for any loss.³ Whether the security is "seasoned" or not is determined through the media of several tests: "What has been the history of the companies during a period of years? Have they paid fair dividends regularly? Have they a proper capital structure? Are they wisely officered? Has a successful business continued over a period of time? Have they

³⁹ *Supra* note 19.

¹ Both the executor's and trustee's investment duties and liabilities have been treated alike. *In re Kent's Estate*, 146 Misc. 155, 159, 261 N. Y. Supp. 698 (1932).

² 140 Misc. 18, 22, 249 N. Y. Supp. 758, 763 (1931) (Executor consulted Moody's Book of Stock Ratings).

³ *In re Winburn*, *supra* note 2; see *Matter of Thompson*, 41 Misc. 420, 84 N. Y. Supp. 1111 (1903).